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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

14	TYLER BRENNEISE, et al.,)	Case No.: 08-cv-28 MMA (WMC)
15	Plaintiffs,)	(consolidated)
16	vs.)	JOINT REPORT OUTLINING
17)	DISCOVERY TO BE COMPLETED
18	SAN DIEGO UNIFIED SCHOOL)	
19	DISTRICT,)	HON. WILLIAM McCURINE, Jr.,
20	Defendant.)	U.S. MAGISTRATE JUDGE
21	<hr/> SAN DIEGO UNIFIED SCHOOL)	
22	DISTRICT)	
23	Plaintiff,)	
24	vs.)	
25	TYLER BRENNEISE, et al.,)	
26	Defendants.)	
27)	
28)	

Pursuant to Order of this Court, issued on October 2, 2009, Plaintiffs (in Case No. 08-cv-28 MMA (WMC)) Tyler Brenneise, Allison Brenneise, Robert Brenneise, and Defendants (in Case No. 08-cv-39 MMA (WMC)) Tyler Brenneise, Allison Brenneise, Robert Brenneise (collectively, the "Brenneises"), Steven Wyner and Wyner & Tiffany (collectively, "W&T"), on the one hand, and Defendant San Diego Unified School District (in Case No. 08-cv-28 MMA (WMC)), and Plaintiff San Diego Unified School District ("SDUSD") (in Case No. 08-cv-39 MMA (WMC)), submit this Joint Report outlining the discovery to be completed in these consolidated cases.

I. SUMMARY OF CLAIMS SUBJECT TO DISCOVERY

A. Initial Disclosures Subject to Rule 26 of the F.R.C.P.

These consolidated cases involve cross-appeals of an administrative decision issued by the California Office of Administrative Hearings. Although an action for review on an administrative record is exempt from the initial disclosure requirements (Rule 26(a)(1)(B)), these consolidated cases also involve claims or causes of action that are not exempt from the initial disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure ("F.R.C.P.").

The Brenneises' Second Amended Complaint, filed on May 8, 2009, includes four separate claims or causes of action for violations of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 ("Section 504"), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 ("ADA"). It also includes two separate claims for attorneys' fees. The Brenneises' Section 504 and ADA claims are not exempt from the initial disclosure requirements of F.R.C.P. Rule 26. Accordingly, the Brenneises and SDUSD are required to make initial disclosures concerning their Section 504 and ADA claims.

SDUSD's Complaint, filed on January 4, 2009 ((in Case No. 08-cv-39 MMA (WMC)), includes a claim or cause of action against Allison and Robert Brenneise and W&T for recovery of SDUSD's attorneys' fees and costs under 20 U.S.C. § 1415(i)(3)(B)(i)(II) and (III). That claim is not exempt from the initial disclosure

1 requirements of F.R.C.P. Rule 26. The Brenneises and W&T believe that SDUSD, the
2 Brenneises and W&T are required to make initial disclosures concerning SDUSD's
3 claim to recover attorneys' fees and costs. SDUSD believes that no initial disclosures or
4 discovery on this claim is necessary or proper. The question of whether the District is
5 entitled to fees under the IDEA is an objective one, such that discovery on this topic is
6 unnecessary, burdensome and oppressive. To the extent SDUSD is required to provide
7 initial disclosures or to respond to further discovery on this claim, the Brenneises and
8 W&T should be required to provide initial disclosures and respond to discovery on their
9 claims for attorneys' fees as well.

10 Pursuant to F.R.C.P. Rule 26(a)(1)(C), initial disclosures must be made "at or
11 within 14 days after the parties' Rule 26(f) conference unless a different time is set by
12 stipulation or court order" A Rule 26(f) conference between the parties has not
13 been scheduled or held. The District believes that no Rule 26(f) conference is necessary
14 in light of the July 6, 2009 Early Neutral Evaluation Conference ("ENE"), the September
15 29, 2009 Status Conference, this Joint Report, and the Court's order on September 29,
16 2009 authorizing the parties to commence discovery.

17 SDUSD contends that at the July 6, 2009 ENE, the parties discussed discovery
18 with the Court generally. According to SDUSD, the parties expressed their desire that
19 the discovery stay remain in effect until the Early Neutral Evaluation ("ENE")
20 Conference, and W&T requested discovery on the SDUSD's attorneys fees claim.
21 SDUSD contends further believes that the Court expressed reluctance to continue the
22 discovery stay, and indicated that once it was lifted, the parties would have a very short
23 time to complete discovery, given how long this case has been pending.

24 According to SDUSD, during the September 29, 2009 Status Conference, after a
25 brief discussion about settlement, Magistrate Judge McCurine indicated to SDUSD's
26 counsel that the Brenneises and W&T wanted to set dates for discovery. Counsel for
27 SDUSD recalls that when the parties were all on the line, Magistrate Judge McCurine
28 instructed the parties to prepare this Joint Report. The District's counsel asked whether

1 the previously imposed stay on motions and discovery was lifted, and the Court
2 responded that the parties could do anything they wanted to do “as of right now.”
3 Accordingly, the District believes that the Court should set a date for initial disclosures
4 pursuant to its proposal below.

5 The Brenneises and W&T do not believe that the July 2009 ENE Conference and
6 September 2009 Status Conference dealt with the issue of discovery. In fact, the topic of
7 discovery was only briefly raised during the July 6, 2009 ENE Conference in light of the
8 Brenneises and W&T request to propound discovery related to SDUSD’s claim or cause
9 of action to recover attorneys’ fees and costs. On July 8, 2009, this Court issued an
10 Order permitting the parties to propound limited discovery (“July 8, 2009 Order) – e.g., a
11 total of fifteen interrogatories and fifteen request for production of documents – related
12 to SDUSD’s claim or cause of action to recover attorneys’ fees and costs alleging that
13 the Brenneises and W&T: continued to litigate after litigation had become clearly
14 frivolous; have presented complaints for the improper purpose of harassing the SDUSD,
15 causing unnecessary delay, and needlessly increasing the cost of litigation; have engaged
16 in “bad faith conduct”; and, as a result SDUSD has incurred substantial attorneys’ fees
17 and costs (collectively, “SDUSD’s Attorneys’ Fees Claim”).

18 Moreover, contrary to SDUSD’s contention, the Court’s September 29, 2009
19 Minute Order does not state that the parties may commence discovery. Although the
20 Court did orally comment on discovery during the telephonic Status Conference, the
21 Court also commented that it would not be appropriate for W&T to focus on discovery
22 before this Joint Report is filed.¹

23 In setting the original date for the ENE Conference, the Court expressly stated
24 that: “Rule 26 of the Federal Rules of Civil Procedure shall apply to this case.” Notice
25 and Order for Early Neutral Evaluation Conference, entered on February 23, 2009 (“ENE
26

27 ¹ The District denies this statement was made.
28

Conference Order”). This Court’s Local Rules requiring an ENE Conference and a Case Management Conference (“CMC”) make clear that the Court, and not the parties, controls the manner in which the litigation proceeds by requiring conferences among the parties and a Magistrate Judge before any scheduling conference is calendared, or any scheduling order is issued, pursuant to Rule 16 of the Federal Rules of Civil Procedure. Under Local Rule 16.1(c)(1), an ENE Conference must be held before a Magistrate Judge for the purpose of exploring settlement. Under Local Rule 16.1(c)(2), if no settlement is reached at the ENE Conference, the Magistrate shall set a date for a Case Management Conference (“CMC”). At the conclusion of the CMC, the Magistrate Judge shall prepare a case management order. While the Brenneises and W&T are frustrated by slow progress of this case, they do not believe that to be adequate rationale for circumventing either the Federal Rules of Civil Procedure or this Court’s Local Rules.

The Brenneises and W&T believe that to date, with a limited exception as it relates to SDUSD’s Attorneys’ Fees Claim, this Court has not yet addressed the issue of discovery in these consolidated cases. Thus, a Rule 26(f) conference is required and the initial disclosures should be timely made by both parties within 14 days of that conference.

B. Discovery to be Conducted by the Brenneises and W&T, Following Initial Disclosures

Pursuant to this Court’s July 8, 2009 Order, on July 10, 2009, Defendant Steven Wyner propounded and served four interrogatories and thirteen requests for production on SDUSD concerning SDUSD’s Attorneys’ Fees Claim. On August 13, 2009, SDUSD served its responses to those interrogatories and that request for production (“SDUSD’s Discovery Responses”). The verifications for each of those Responses were not served until August 14, 2009. The Brenneises and W&T maintain that the SDUSD failed to produce any documents on August 14, 2009, as required. The SDUSD states that approximately 1,500 pages of responsive documents were produced along with the Responses on August 13. Neither the Brenneises nor W&T received any of the

1 “approximately 1,500 pages of responsive documents” which SDUSD claims to have
2 produced.

3 Prior to the Case Management/Settlement Conference held on August 19, 2009,
4 W&T reviewed SDUSD’s Discovery Responses and formed the opinion that such
5 responses were evasive, incomplete, and in some instances wholly nonresponsive. At
6 the end of the Case Management/Settlement Conference, Magistrate Judge McCurine
7 ordered a stay, prohibiting the parties from filing any further motions and from
8 conducting any further discovery, including, but not limited to, staying any meet and
9 confer regarding SDUSD’s Discovery Responses, pending further settlement
10 negotiations.

11 During a telephonic Status Conference held on September 29, 2009, Magistrate
12 Judge McCurine ordered the parties to submit a joint report outlining discovery to be
13 completed, and lifted the stay on discovery. W&T is ready to meet and confer with
14 SDUSD’s counsel regarding SDUSD’s Discovery Responses. However, W&T
15 understood the Court’s comments on September 29th as an admonition to complete and
16 file this Joint Report before taking any further action in the litigation SDUSD disagrees
17 with this understanding, as it is under the belief that it specifically asked the Court
18 whether the stay was lifted on motions and discovery, and the Court responded that the
19 parties could do anything they wanted to do in the litigation “as of right now.”²
20

21 ² On September 30, 2009, SDUSD filed a motion for partial summary judgment, or in the
22 alternative, a motion for a ruling on its IDEA appeal, seeking reversal of all issues
23 decided in the Brenneises’ favor in the administrative decision, and setting a hearing for
24 November 2, 2009. The Brenneises’ opposition must be filed on October 19th. The
25 Brenneises’ contend that SDUSD’s moving papers exceed the page limits for motions,
26 and SDUSD should not have filed its motion until District Court Judge Anello issues his
27 ruling on SDUSD’s motion to extend page limits, which was taken under submission
28 pending the ENE Conference held on August 19, 2009. SDUSD disagrees with these
contentions.

1 On October 2, 2009, Defendant SDUSD propounded 124 requests for production
2 of documents which it served on Plaintiff Tyler Brenneise, a minor. Defendant SDUSD
3 also propounded 37 requests for production of documents, which it served on Plaintiff
4 Robert Brenneise, and a separate set of requests, also including 37 requests for
5 production, were served on Plaintiff Allison Brenneise. On October 9, 2009, the District
6 propounded interrogatories on each of those Plaintiffs. The Brenneises and W&T
7 believe this discovery was propounded in violation of F.R.C.P. Rule 26(d)(1), which
8 prohibits discovery before the parties have met and conferred in accordance with Rule
9 26(f), unless by stipulation or court order, and that a Rule 26(f) conference has not been
10 scheduled or held. For the reasons indicated above, the SDUSD disagrees with these
11 contentions.

12 W&T intends to schedule a telephonic meet and confer during the week of
13 October 12th for the purpose of resolving and/or narrowing the scope of discovery
14 disputes concerning SDUSD's Discovery Responses, and its alleged production of
15 "approximately 1,500 pages of responsive documents". The Brenneises and W&T
16 contend that SDUSD failed to produce any documents, including those which SDUSD
17 indicated that it would produce, in its response to the 13 items requested for production.
18 Depending on the outcome of that meet and confer, the Brenneises and W&T may file a
19 motion to compel further responses, if such discovery dispute cannot be resolved. The
20 District is willing to participate in a telephonic meet and confer that week, and also to
21 hold a Rule 26(f) conference that the Brenneises and W&T contend has been lacking, so
22 as to avoid any delay in the serving of initial disclosures.

23 At such time as SDUSD serves responses that the Brenneises and W&T deem
24 appropriate, the Brenneises and W&T intend to propound and serve requests for
25 admissions.³

26 _____
27 ³ The SDUSD disagrees with the characterization of its previous responses to discovery
28 as inappropriate and/or incomplete.

1 At such time as SDUSD serves responses to requests for admissions that the
2 Brenneises and W&T deem appropriate, the Brenneises and W&T intend to notice the
3 depositions of the following individuals, identified by SDUSD in its discovery responses
4 as having knowledge of the facts asserted in its responses to interrogatories: MarySue
5 Glynn, Sheila Doctors, Howard Taras, Linda Vergara, Michele Bronson, Matthew
6 Howarth, Mary Kay Chandler, Phyllis Gahan, Patricia LaBouff, Anne Callies, and Becky
7 Paradise.

8 In addition, the Brenneises intend to serve interrogatories, requests for production
9 of documents, requests for admissions, and to notice depositions with respect to their
10 Section 504 and ADA claims. Because SDUSD has not made any initial disclosures, the
11 Brenneises are unable to identify all individuals who they may wish to depose.
12 However, W&T believes that the depositions of certain of the individuals identified in
13 the preceding paragraph will be taken as to those claims, as well as SDUSD's Attorneys'
14 Fees Claim. W&T anticipates that such depositions will take approximately six to seven
15 days to complete, excluding any motions to compel.

16 Taking into account, the parties differing perspectives in this litigation, from
17 which it may be inferred that motions to compel discovery responses may be required, as
18 well as the fact that initial disclosures have not been made, W&T respectfully requests
19 eight months to complete discovery, excluding the time necessary to hear and adjudicate
20 any motions to compel filed before the expiration of such eight month period.

21 **C. Discovery to be Conducted by the SDUSD, Following Initial Disclosures**

22 SDUSD anticipates serving additional requests for production of documents on the
23 Brenneises, as well as interrogatories and requests for admissions. It also plans to
24 depose all of the plaintiffs.

25 In addition, it anticipates serving subpoenas for the production of records or for
26 the production of records and testimony on third party witnesses, including witnesses
27 relevant to Tyler Brenneise's medical conditions, his extracurricular activities, and his
28 education after leaving the SDUSD, and to other issues arising under the Section 504 and

1 ADA claims, including implementation of his stay put IEP and of Administrative Law
 2 Judge Ruff's order. It also anticipates serving subpoenas relevant to the remedies
 3 requested by all of the Brenneises under their Section 504 and ADA causes of action.
 4 Additional subpoenas may be necessary on topics relevant to the credibility of the
 5 Brenneises.

6 SDUSD also anticipates moving for a physical examination of Tyler Brenneise
 7 relating to his health conditions.

8 At this time, SDUSD anticipates taking the following depositions:

9 <u>PERSON</u>	<u>WHEN</u>	<u>WHERE</u>
10 Robert Brenneise	January 2010	Minnesota
11 Allison Brenneise	January 2010	Minnesota
12 Tyler Brenneise	January 2010	Minnesota
13 PMK at the Minnetonka		
14 School District	January 2010	Minnesota
15 Chris Vinceneux	February 2010	San Diego
16 PMK at KIDS Therapy		
17 Options	February 2010	San Diego
18 PMK at ACES	February 2010	San Diego

19
 20 Depending upon the information learned through discovery and investigation, the
 21 deposition of others with knowledge of Tyler Brenneise's medical conditions, his
 22 extracurricular activities, the implementation of his academic program during stay put,
 23 and his education after leaving the SDUSD, and of the facts relevant to the remedies
 24 requested by all of the Brenneises under the Section 504 and ADA causes of action,
 25 and/or depositions going to the credibility of the Brenneises may be necessary.

26 Depending upon the Court's view of the discoverability of issues relating to the
 27 attorneys' fees claims, discovery on those topics may be necessary as well.
 28

SDUSD proposes the following schedule for completing initial disclosures and discovery:

<u>WHAT</u>	<u>WHEN</u>
Initial Disclosures	October 30, 2009
Non-expert Discovery Cut Off	April 30, 2010
Expert Disclosures	May 31, 2010
Rebuttal Expert Disclosures	June 30, 2010
Expert Discovery Cut Off	July 30, 2010

SDUSD does not believe that any changes should be made to the limitations imposed on discovery under the Federal Rules of Civil Procedure in terms of restrictions on the number of interrogatories per party, the number of depositions per side, or the restriction on deposing the same person more than once in a case, as set forth in F.R.C.P. 33(a) and 30(a)(2)(A)-(B). SDUSD notes that the Brenneises and W&T's proposed discovery plan, set forth above, includes depositions of at least eleven individuals. The District does not agree that they should be permitted more than 10 non-expert depositions total, and believes that any individual they depose should be deposed only once. This is especially true here, as the parties have already spent 27 days in hearing, and there is a voluminous administrative record with testimony of each of the witnesses they plan to depose. In addition, SDUSD disagrees with the Brenneises and W&T's characterization of the previous interrogatories they served upon SDUSD as being four in number. It is SDUSD's position that those interrogatories contained numerous discrete subparts, such that they each comprised multiple interrogatories.

The Brenneises and W&T disagree with the forgoing discovery schedule and limitations on discovery proposed by SDUSD. Indeed, the Brenneises and W&T believe that such contentions are beyond the scope of the Joint Report requested by the Court. The Brenneises and W&T believe that the parties are required to meet and confer pursuant to Rule 26(f) to address such issues, file a written report with the Court

1 outlining the plan for discovery, make their initial disclosures within 14 days of the Rule
2 26(f) conference, and await the Court's scheduling order.

3 **The Brenneises and W&T did not understand the Court's request for a Joint**
4 **Report outlining discovery that needs to be completed as a substitute for a Rule**
5 **26(f) conference.**

6 Respectfully submitted,

7
8 *Wyner & Tiffany*

9 ATTORNEYS AT LAW

10 Dated: October 9, 2009

11 /S/ Steven Wyner

12 Attorneys for the Brenneises,
13 Steven Wyner, and Wyner & Tiffany

14
15 *Miller Brown Dannis*

16 ATTORNEYS AT LAW

17 Dated: October 9, 2009

18 /S/ Amy R. Levine

19 Attorneys for San Diego
20 Unified School District
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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of 18 and that I am not a party to this action. On October 9, 2009, I served this JOINT REPORT OUTLINING DISCOVERY TO BE COMPLETED on the San Diego Unified School District by serving their counsel of record electronically via electronic mail,.

Dated: October 9, 2009

/S/ Dana H. Wilkins